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No. 90-1394

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AND ITS LOCAL 304A,
Petitioners,

v.

JOHN MORRELL & CO.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONERS

LAURENCE GOLD
(Counsel of Record)
DAVID SILBERMAN
815 16th Street, N.W.
Washington, DC 20006
(202) 637-5390

GEORGE MURPHY
NICHOLAS W. CLARK
RICHARD ROESEL
1775 K Street, N.W.
Washington, DC 20005

DONALD SHULTZ
9th & St. Joe
First Federal Plaza
Rapid City, ND 57709

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REPLY BRIEF FOR PETITIONERS

I. THE NO-STRIKE CLAUSE AND THE CLEAR AND UNMISTAKABLE WAIVER DOCTRINE

In its zeal to find some way to reshape the law of the Eighth Circuit, as stated in the decision below, to fit with the law of the Seventh Circuit, respondent John Morrell & Co. ("Morrell") misstates both the central issue presented by this case and the rulings of the Seventh Circuit.

1. To start with what is most basic, it simply is *not* true that the court below was called on to interpret, or issued a decision interpreting, a no-strike provision that "is comprehensive" and that "provides that there shall be no strikes." Morrell Brief ("M.Br.") at 13.

As we recognized in our certiorari petition (at 7), many no-strike provisions are *unconditional and unlimited*, and there is no doubt that such provisions can be fairly read, in accordance with their words, to waive the right to engage in all strikes.[1] But, as we observed there, it is also true that at least one-third of all no-strike provisions are *conditional and limited*, and it is self-evident that such provision can *not* be fairly read, in accordance with their words, to work such an all encompassing waiver.

The instant no-strike provision does *not* take the form of an "unconditional and unlimited" no-strike pledge but rather of a "conditional and limited" pledge. Its words—which, significantly, *do not appear even once in Morrell's twenty-page discussion of the provision*—are as follows:

> Provisions having been made by this Agreement and local agreements for the peaceful and orderly

[1] Lest there be any doubt as to our position, *see* M.Br. at 11, 18-19, we hasten to add that it is *not* our contention that a no-strike provision must refer specifically to sympathy strikes to effect a waiver of the right to engage in such strikes; rather, as noted in text, a provision prohibiting all strikes is properly read to waive the right to engage in all strikes, including sympathy strikes, so long as the parties so intended.

> settlement of any disputes which may arise between Company and the Union or local Unions or any Employee or Employees, it is agreed that during the term of this Agreement there shall be no strike, stoppage, slowdown, or suspension of work on the part of the Union or any local Union or any Union member or lockout on the part of the Company on account of such disputes until after an earnest effort shall be made to settle all such matters in the manner provided in the respective agreements. [1985-88 Sioux Falls Collective Bargaining Agreement, Article II, cl.5, Pet. App. 3a.]

Thus Morrell is simply wrong in asserting that the clause "provides that there shall be no strikes"; what the clause actually says is that "there shall be no strike . . . *on account of such disputes until after an earnest effort shall be made to settle all such matters in the manner provided in the respective agreements.*" By its terms, then, this is a *conditional and limited* prohibition against a certain category of strikes and only until certain procedures have been exhausted.

Indeed, it is clear on the face of things—as Arbitrator Rentfro recognized—that this provision *cannot* be read to reach sympathy strikes; as the Arbitrator stated, such a reading "pushes the language of the contract past the breaking point." Pet. App. 93a-94a. The very most that can be said is that the prohibition of strikes "on account of such disputes" refers to—and proscribes—strikes over "any disputes which may arise between the Company and the Union." But a sympathy strike, by definition, is *not* a strike over a dispute between the Company and the Union; it is a strike in support of a dispute between the company and a group of employees not party to the contract. The no-strike provision plainly does *not* prohibit strikes over such disputes.

The best proof of that proposition is that at *no* point in this litigation—including its brief to this Court—has Morrell, the court below or the trial court *offered any*

reading of the provision's words that would expand the provision's coverage to sympathy strikes.[2]

2. For purposes of our *certiorari* petition, however, we have indulged the assumption of the Eighth Circuit and of Morrell that the words of the no-strike provision here are somehow "ambiguous" and that the question posed is whether such an "ambiguous" provision—which does not, on its face, manifest an intent to prohibit sympathy strikes—can nonetheless suffice to establish a "clear and unmistakable waiver" of the right to engage in such strikes.

Morrell's brief argues at length for an affirmatve answer to that question. Morrell ultimately bases its submission on the proposition that " 'the words parties use . . . are only evidence of their intent; the words are not themselves the parties' intent.' " M.Br. at 15, *quoting Electrical Workers Local 1395 v. NLRB*, 797 F.2d 1027, 1036 (D.C. Cir. 1986). Thus, according to Morrell, so long as the parties' intent is "clear" (in the eyes of the jury) a waiver can be found even where that intent

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[2] As it has in the past, Morrell again attempts to divert attention from the language of the no-strike provision at issue and to focus instead on other provisions of the parties' collective bargaining agreement.

Morrell places great weight on Article II, § 3 which, according to Morrell, "provides that '[i]t is the intent and purpose of the parties' to 'establish the means to facilitate peaceful adjustments of all grievances or other disputes. . . .' " M.Br. 13.

Morrell's ellipses delete what is, for present purposes, the critical phrase of that section: "disputes *that may arise between the Company and the Union*." This provision thus confirms that the contract addresses only disputes between the parties and not disputes between Morrell and a union that is not a party to the contract. Morrell's omission of the underscored words is pregnant with significance.

Morrell also relies on the "struck work" provision of the contract, M.Br. 14, but does so without responding to our showing in the petition (at 21 n.7) that the "struck work" provision and the no-strike provision address separate problems each of which arises in a distinct legal and factual context.

"has been imperfectly expressed by the contract." M.Br. 17-18.

As we acknowledged in our petition (at 14 & n.5), that is the stated position of the District of Columbia Circuit and at least the implied premise of the Eighth Circuit decision below. But as we argued there, that deconstructionist view—that a contract's "words are not the parties' intent"—devitalizes the entire contracting enterprise. The office of § 301 of the Labor Management Relations Act—and, indeed, of any regime of contract law—is to enable "individuals to order their personal and business affairs according to their particular needs and interests" on the understanding that "[o]nce arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978). That being so, the proper judicial role under § 301 is to interpret the words of a labor contract according to their fair meaning, and not to enforce a judge's (or jury's) construct of the parties' "true intent."

3. Whatever the merits of the approach to contract interpretation embraced by the D.C. and Eighth Circuits and championed by Morrell here, that approach has no legitimate place in determining whether a labor contract contains a clear and unmistakable waiver of a statutory right. The decisions of the Seventh Circuit so recognize, and Morrell's attempt to deny the existence of a circuit conflict is wholly unavailing.

(a) Morrell first attempts to dismiss *Gary Hobart Water Corp. v. NLRB*, 511 F.2d 284 (7th Cir. 1975), *cert. denied*, 423 U.S. 925 as a "simpl[e] illustrat[ion]" of the principle that "the issue of waiver depends upon the parties' intent"; according to Morrell, *Gary Hobart* merely holds that the no-strike provision at issue there—whose language closely parallels the language of the instant no-strike provision—"unambiguously expressed the parties' intent." M.Br. 10. But that is not what the Seventh Circuit said in *Gary Hobart*.

Gary Hobart starts from the premise that "In this circuit . . . the preferable rule requires that waiver be in '*clear and unmistakable language.*'" 511 F.2d at 287 (emphasis added). After reviewing the text of the no-strike provision before it, the Seventh Circuit concluded that the provision "seems to us clearly not to affect the right to engage in a sympathy strike. *In any event it is not clear and unmistakable language waiving that right.*" *Id.* at 288 (emphasis added). That court then added: "Under these circumstances, the bargaining history between the Company and Union need not be examined." *Id.* Thus, in sharp contrast to the decision below, *Gary Hobart* requires "clear and unmistakable language" to effect a waiver, and *Gary Hobart* found no waiver because the contract in that case did not contain such "clear and unmistakable language." [3]

(b) Morrell next claims that *Gary Hobart* was eroded, *sub silentio*, by the Seventh Circuit's subsequent decision in *W-I Canteen Service v. NLRB*, 606 F.2d 738 (7th Cir. 1979). But *W-I Canteen* starts from the very same premises as *Gary Hobart*: waiver turns on "a case-by-case analysis of the *language of the bargaining agreements in issue* and on their operation within the factual circumstances of the labor controversy at hand." 606 F.2d at 743 (emphasis added).[4] From that premise, the court in *W-I Canteen* "turn[ed] *to the express terms of the* [*no strike*] *clause* to determine whether they clearly and unmistakably waive the right to engage in a sym-

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[3] As the discussion in text shows, Morrell is wrong in asserting that *Gary Hobart* "did not rule that the no-strike clause must itself explicitly waive the right to engage in sympathy strikes" and did not "rule that extrinsic evidence could not be considered in interpreting ambiguous no-strike provisions." M.Br. 11.

[4] It is, of course, true, as Morrell notes (M.Br. 12), that *W-I Canteen* did reject the proposition "that the no-strike clause [must] contain the specific term 'sympathy strike' before finding a waiver." But, as already noted, *see* n.1 *supra*, to say that a no-strike provision can waive the right to engage in sympathy strikes without specifically referencing such strikes is not the same as saying that an ambiguous provision can constitute a clear and unmistakable waiver.

pathy strike." *Id.* at 744 (emphasis added). The Seventh Circuit's affirmative answer to that question was determinative although that court did go on to look at the extrinsic evidence to buttress its holding, explaining: "Although we are satisfied that the *language of the no-strike clause is sufficiently clear to preclude sympathy strikes* . . . we nevertheless turn to a discussion of the extrinsic evidence of intent in the record." *Id.* at 746 (emphasis added).

Far from undermining *Gary Hobart*, then, *W-I Canteen reaffirms* the former decision's requirement of "clear and unmistakable language" to effectuate a waiver of a statutory right vouchsafed in the National Labor Relations Act.[5]

(c) Nor is there anything in *United States Steel Co. v. NLRB*, 711 F.2d 772 (7th Cir. 1983), or in *Indianapolis Power & Light Co. v. NLRB*, 898 F.2d 524 (7th Cir. 1990), that undermines the continuing vitality of *Gary Hobart*. Those cases both involved *unconditional and unlimited* no-strike provisions—provisions which, on their face, prohibit all strikes, *see* 711 F.2d at 778, 898 F.2d at 526 n.1—and thus neither case posed the question addressed in *Gary Hobart* and posed here as to whether a *conditional and limited* provision can effect a waiver.[6]

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[5] Morrell attempts to confuse the clear teaching of *W-I Canteen* by asserting that the no-strike provision at issue in that case is similar to the provision involved in this case (and in *Gary Hobart*) because the *W-I Canteen* provision "referred to the arbitration procedures." M.Br. 12. But as *W-I Canteen* explained, the no-strike provision at issue there

> expressly extends beyond the scope of the arbitration clause. It not only applies as long as parties abide by the agreement, which of course includes the arbitration of disputes under the contract, but also applies as long as "the Company and the Union . . . submit to arbitration any differences which may arise which *are not covered by the Agreement*." From this language in the no-strike clause we conclude that the Board erroneously applied the principle of coterminous application to

The very most that can be derived from *United States Steel* and *Indianapolis Power & Light* is that contract language which on its face covers sympathy strikes is a necessary, but not sufficient, predicate for a waiver of sympathy-strike rights where the "extrinsic evidence of the parties' intent does not demonstrate the parties' mutually agreed to include such rights within the breadth of the no-strike clause." *Indianapolis Power & Light*, 898 F.2d at 528. As the Seventh Circuit explained, that rule

> gives effect to the literal, all-encompassing language of the parties' own agreement unless the extrinsic evidence demonstrates that the parties intended otherwise. Thus the rule reasonably accommodates two important policies: that a waiver of statutory rights is not to be lightly inferred, and that parties should be free to bargain and enter into an agreement reflecting their bargain. [*Id.* at 529].

(d) The short of the matter, then, is this. *Gary Hobart* remains good law in the Seventh Circuit. The result reached below—finding a waiver in the no-strike provision at issue here—cannot be reconciled with the result in *Gary Hobart* which found that an analytically indistinguishable clause could *not* be read to effectuate such a waiver.[6]

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the arbitration and no-strike clauses. [606 F.2d at 744; emphasis supplied by the Court.]

Thus, the unique text involved in *W-I Canteen* was altogether different from the provision involved here, and the Seventh Circuit's finding that that text "is sufficiently clear to preclude sympathy strikes" in no way vitiates the force of *Gary Hobart's* requirement that waivers be clearly stated or *Gary Hobart's* holding that "conditional and limited" no-strike provisions do *not* waive the right to engage in sympathy strikes.

[6] In a last-gasp effort to defeat review, Morrell contends that "the Unions waived the issue below." M.Br. 18. Again, Morrell is simply wrong.

In our brief below we began by reviewing the "basic principles of contract law" as formulated by the Eighth Circuit, including the rule that extrinsic evidence may be relied upon to interpret ambiguous provisions. But we went on to argue that "to frame the issue solely in these terms ignores the labor-law context in

II. THE ARBITRATION AWARD AND THE SCOPE OF JUDICIAL REVIEW

1. It is undisputed that Arbitrator Rentfro concluded that, in order to decide the grievance over Morrell's treatment of the returning strikers that was submitted to him for decision, it was "necessary to address" the question of the lawfulness *vel non* of the sympathy strike because the Union "grounds its arguments in the assumption that the strike was not a breach of the contract" whereas "Morrell relies, fundamentally, on its assertion that the strike was a breach of contract." Pet. App. 91a. The Eighth Circuit overturned the Arbitrator's award because, as that court stated, "We are not persuaded that . . . Morrell intended to arbitrate the meaning of the no-strike clause" and thus "we are satisfied that the arbitrator was not 'evenly arguably . . . acting within the scope of his authority.'" Pet. App. 31a.

Morrell strives to harmonize the decision below with the decisions in *Food and Commercial Workers Local 7R v. Safeway*, 889 F.2d 940 (10 Cir. 1989), and *Johnston Boiler Co. v. Local Lodge 893*, 753 F.2d 40 (6th Cir. 1985), discussed at Pet. 25-26, on the theory that those decisions also recognize that "[t]he scope of the issues submitted to the arbitrator . . . controls the arbitrator's authority.'" M.Br. 21, *quoting Food and Commercial Workers Local 7R*, 889 F.2d at 946.

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which this case arises and the substantive labor-law principles that are therefore implicated here." U.Br. at 19-20. And after reviewing those principles—and in particular, the waiver doctrine—we went on to argue that it was *not* sufficient here to find that "two contrary interpretations of [the] no-strike clause . . . are plausible", and that "only an agreement which 'clear[ly] and unmistakab[ly] negates th[e] statutory right [to engage in sympathy strikes] . . . provides a legally sufficient basis for a breach of contract claim based on a sympathy strike." *Id.* at 21-22. Indeed our ultimate submission below was that the district court had erred, as a matter of law, in submitting the case to the jury as "it was not open to Morrell to attempt to prove, on the basis of extrinsic evidence, that the no-strike clause at issue here was intended to proscribe [sympathy] strikes." *Id.* at 30. That remains our position in this Court.

But, as we explained in our petition, there is a critical difference between the decision below and the decisions of the Tenth and Sixth Circuits: the latter cases limit the arbitrator's authority only to the extent the parties "*expressly restrict*" the arbitrator as by "submitting a precise statement of the issues to the arbitrator." *Food and Commercial Workers Local 7R*, 889 F.2d at 947 (emphasis added). In contrast, the court below took it upon itself to determine the scope of the issues implicated by the grievance submitted to the arbitrator absent any sort of clear and express agreement of the parties limiting the arbitrator's authority.

Thus, contrary to Morrell's argument, the decision below cannot be reconciled with the decisions relied upon in our petition.

2. Morrell is equally wide of the mark in contending that the holding below requiring the Arbitrator to give collateral estoppel effect to the jury's interpretation of the no-strike provision is consistent with this Court's decision in *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983).

It is true, as Morrell observes, that there are "fundamental differences between the functions of courts and arbitrators." M.Br. 26. But *W.R. Grace*'s holding that arbitrators are not obligated to give res judicata effect to a prior arbitral award was *not* based on any of these differences or on the reliability *vel non* of arbitral decisions. Rather, *W.R. Grace* refused to bind the arbitrator because "the scope of the arbitrator's authority is itself a question of contract interpretation." 461 U.S. at 765. Thus, it is *for the arbitrator to decide*—as Arbitrator Rentfro expressly did here—whether and to what extent the parties intend the arbitrator to be bound by a prior determination. The decision below flies in the face of that reasoning.[7]

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[7] Morrell contends that it would be "fundamentally unfair if the union were permitted to have the arbitrator disregard the

3. Finally, Morrell is wrong in suggesting that there is a consensus in the courts of appeals with respect to the "distinction between 'finality' for collateral estoppel purposes and 'finality' for appeal purposes." M.Br. 27. Morrell seeks to cabin *Avondale Shipyards Inc. v. Insured Lloyd's*, 786 F.2d 1265 (5th Cir. 1986), by arguing that *Avondale Shipyards* denied collateral estoppel effect only to those interlocutory decisions—such as partial summary judgment rulings—which "are subject to continuing change, modification, or reversal." M.Br. 28. But *every* interlocutory decision is, by definition, subject to change until subject to appellate review. Thus by Morrell's own admission *Avondale Shipyards* necessarily calls into question the teaching of the Second Circuit in *Lummus Co. v. Commonwealth Oil Ref. Co.*, 297 F.2d 80, 89 (2d Cir. 1961), *cert. denied*, 368 U.S. 986, that non-final orders are entitled to collateral estoppel effect. The same is true of the Seventh and Ninth Circuit decisions cited in our petition (at 30), which Morrell does not even mention.

CONCLUSION

For the foregoing reasons, and those stated in our petition, the Court should issue a writ of certiorari.

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jury's verdict" because "the unions forced the courts—instead of an arbitrator—to decide [the meaning of the contract]." That statement is grossly misleading. This suit was brought by *Morrell*; the Unions were *the defendants* in the trial court. The Unions did nothing to "force the courts" to decide the issue; the reason why the grievances initially filed over Morrell's notation of the strikers' absence in their personnel files, see App. 72a, did not result in an arbitration of the sympathy strikers' rights was that *Morrell mooted the grievances* by giving the strikers perfect attendance awards which included credit for the period of the 1986 strikes. During the entire seven month period of the 1987 strike, moreover, Morrell "did not discharge, reprimand, or take any disciplinary action against the members of Local 304A for honoring the Sioux City picket line." *John Morrell & Company v. South Dakota Dept. of Labor*, 460 N.W. 2d 141, 142 (1990). The Union thus had nothing left to grieve until the 1987 strike ended and Morrell refused to immediately reinstate the strikers to their old jobs. Those grievances resulted in Arbitrator Rentfro's award.

Respectfully submitted,

LAURENCE GOLD
(Counsel of Record)
DAVID SILBERMAN
815 16th Street, N.W.
Washington, DC 20006
(202) 637-5390

GEORGE MURPHY
NICHOLAS W. CLARK
RICHARD ROESEL
1775 K Street, N.W.
Washington, DC 20005

DONALD SHULTZ
9th & St. Joe
First Federal Plaza
Rapid City, ND 57709